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## CURRENT TOPICS.

A correspondent in a distant State, who seems to be under the impression that we have taken a contract for a reformation of all the abuses incident to the administration of justice, and, apparently, pays us the compliment to believe that we are fully equal to the undertaking, writes us a peppery letter anent the *personel* of the appellate bench in many of the States. He says: "I would like to read a stinging page or two, under 'Current Topics,' from your pen, on Basswood Judges, say. The States are full, if you please, of judges so-called, whose main business it is to draw their salaries and seek investments. * * I may be radically severe. Caucuses and partisanship (in conventions and Governors) put strange creatures on the bench. Judges ought not to be exempt from criticism, scathing, open condemnation. There are so many little fellows on the bench, shrinking into good fifth rate lawyers; and largely, the bar are to blame for it. It needs educating, and you must begin it."

We do think our correspondent is "radically severe," nor can we assume to play the rather extravagant role which he is inclined to thrust upon us, of public educator and tutor to the bar. The journalistic assurance requisite for the assumption of such an attitude must be of a very extraordinary quality indeed. All we claim in the way of prestige for our utterances on such topics is based upon the record of the JOURNAL, in having through a long period of time, conscientiously and successfully reflected the opinion, thought, feeling and even prejudices, of a large body of readers, in a most thoughtful and conservative profession, as witnessed by the substantial and steadily increasing support by which our efforts have always been rewarded. The continued approbation of our public, evidenced by a very extensive circulation, is our sole claim to special consideration and hearing.

We agree with our correspondent that the bench should not be exempt from criticism, and we have never hesitated to exercise the privilege of honest comment, which we consider that we hold in common, with the general public, restrained in a measure, by the consciousness that injustice, or precipitance in condemnation would be visited with the disapprobation of the calmer judgment of our readers. But, as we have said before, we think that our correspondent is "radically severe." While the standard of the bench is by no means up to the ideal, nor, indeed, up to the highest practicable and attainable excellence, it is not so far below that of the bar at large, as our correspondent would seem to think. The political element which enters into the choice of judges is undoubtedly a grave misfortune and disadvantage; and we believe that no one would recognize the truth of this statement more readily than the judges themselves. The office of Supreme Judge is not a political office (and can not be in the nature of things, as long as the administration of justice maintains its purity), and, consequently in nominating conventions, it is traded for offices that are political; and in elections the relative merits of rival candidates are lost sight of in the enthusiasm for the general ticket. The remedy seems to us to be plain: Detach the office from all political influences, by having the nominations and elections for the office take place at an entirely distinct period. Let the question presented to the voter be solely as to the merits of the rival candidates. This method is now we believe in operation in at least one of the States, and gives universal satisfaction. We think that the experience of every one will show that in what is called a "scrub race" for the bench, upon the occasion of filling an accidental vacancy, etc., where no other offices are to be filled, the choice of the people is almost always a judicious one.

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The Connecticut Supreme Court of Errors has recently decided that Miss Mary Hooker is not inelligible for admission to the bar, and has ordered the county court to entertain her application. We trust that the young woman will now vindicate the policy of the law, as interpreted by the court, by actually engaging in practice rather than indulge in the not unusual proceeding of misusing her license as an advertisement of a season upon the lecture platform.

## IRREGULAR INDORSERS OF PROMISSORY NOTES.

Cochran v. Atchison,[1] reaches a class of indorsements which is very common and necessary in our every-day commercial transactions. The circumstances were briefly these: One Owen, being of the same name as the payee, obtained a bill payable to "order," and fraudulently presented the same at a bank for payment. The defendant, for the purpose of identifying Owen, went to the bank, and, at the request of the cashier, wrote his name upon the bill after that of the payee. The amount of the bill was then given to said Owen by the cashier, who, however, upon ascertaining the fraud, paid the sum called for by the bill to the real payee. This action was brought to recover the amount so paid from the defendant; and the court held: That the defense could not be interposed by defendant that he did not understand that he was assuming the obligation of an indorser, and so relieve himself against a *bona fide* indorsee for value, nor could the fact that he had no knowledge that said Owen was not the real payee, or that the cashier was negligent, avail him at a time when it would result to the injury of such indorsee. The court further defines the exact obligations incurred by a party so indorsing as a warranty: "That the bill was in every respect genuine; that it was the valid instrument it purported to be; that the parties were competent; that he had a lawful title to the bill and a right to indorse it."

The reasoning which underlies this class of cases, although dealing with technicalities, will be found for the greater part to be an effort to give such contract of indorsement a construction that shall best conform to the actual intent of the parties,[2] where this can be done in the light of established precedents and without forcing the contract out of its real signification. How far these efforts of our courts have succeeded in reconciling the various decisions and establishing a common basis, or rule of law, to fully determine the liability of those who, without being a party to a promissory note, have indorsed their names thereon in blank, is a question worthy of much consideration.

The cause of Champion v. Griffith,[3] decides that when a stranger to the note signs his name upon the back thereof at the time of its execution, and, without limiting his liability, his obligation is that of a promisor; that this is true where such party indorses the note afterwards upon an agreement, or intending that his responsibility should date from the execution. That the legal presumption arising from such indorsement alone without other evidence was that of guaranty, and that parol evidence was admissible to show the true nature of the contract.[4] But the court, Ramney, J., in Greenough v. Smead,[5] although following Champion v. Griffith, and Robinson v. Abell,[6] says: "Two governing principles should be kept constantly in view: 1. That such a construction should be placed upon the contract as will prevent its failure and will give effect to the obligation of each of the parties appearing upon it at the moment the contract itself takes effect *ut res magis quam pereat*. 2. Whenever the obligation of a party appearing upon the back of negotiable paper can, at that time take effect as an indorsement, it should always be held to do so as conforming more nearly to the general intent of the parties assuming that position upon it."

In New York, Dean v. Hall,[7] was apparently a departure from the causes in that State which had held such irregular indorsers liable as joint, or joint and several makers, or as guarantors. In this cause the note was made payable to one Howard, "or bearer," and was indorsed on the back in blank by the defendant Hall. In his declaration the plaintiff claimed to recover against Hall as maker, and it was determined on a demurrer that the action could not be maintained, because the count in question failed to aver a demand and notice of non-payment at the expiration of the days of grace. The point whether defendant could be charged as maker or indorser was ably argued, and although Cowen, J.,

[1] Supreme Court of Kansas, May, 1882. Reported in full 14 Cent. L. J. 414.

[2] Rey v. Simpson, 22 How. (U. S.) 341, came up from Supreme Court of Minn.

[3] 13 Ohio, 228.

[4] Bright v. Carpenter, 9 Ohio, 139; s. c., 34 Am. Dec. 432. See also note by editor in Greene v. Dodge, 2 Ohio, 440; most of the cases in this State, down to that of Gale v. Van Arman (1849), are revised.

[5] 3 Ohio St. 416 (1854).

[6] 17 Ohio, 42.

[7] 17 Wend. 217 (1837).

does not definitely draw the line between negotiable and non-negotiable notes in this respect; yet he considers that as to those cases[8] where parties were held liable as makers or guarantors, "The utmost they establish is, that where the defendant is privy to the consideration and indorses a note not negotiable, or at most one payable to the plaintiff or bearer and not negotiated, the declaration may then charge the defendant directly as the maker. This is the extent of Herrick v. Carman and Nelson v. Dubois, which go the farthest; none of these cases can mean that whatever may be the consideration, if the defendant stand in the ordinary relation of commercial indorser, he is not to be treated as such." The liability of such third party who indorses in blank is now, in New York, without doubt that of indorser in case of negotiable notes, and guarantor or maker on non-negotiable note.[9] So it is the presumption that one so indorsing a note before delivery, must have contemplated that the payee would indorse the same before negotiating it;[10] but this presumption may, however, be explained or rebutted.[11] The language of all the cases in New York since Dean v. Hall, is substantially as follows: That the courts will, if possible, so construct a contract of this character as that it may be enforced, provided they do not thereby make a new contract between the parties, or substitute a different one from that contemplated;[12] that strictly in law there can be no such thing as an indorser of a non-negotiable note, that it is to be presumed that some liability was intended to be contracted, and of necessity the most reasonable interpretation of such intent is to make the irregular indorser a guarantor or maker; that on negotiable notes, the intent with which he was presumed to have indorsed is governed by the possibility of holding him liable strictly as indorser, and the legal presumption that he is indorser is determined fully by this possibility. Johnson, C. J., in the well known cause of Moore v. Cross,[13] in considering the contract of a third party, who indorses for the purpose of obtaining additional credit with the payee in behalf of the maker, and the right of such payee to indorse such note without recourse at any time, and thereby to hold such second indorser liable, says: "Some confusion has been thrown around this subject from what has been finally settled to have been an error; treating such indorsement as a guaranty, and charging the indorser as maker or guarantor."[14] It is undoubtedly true as a general rule of law, that no legal presumption that one's indorsement is to be used for the purpose of obtaining additional credit with the payee, arises against an indorser because he writes his name on a note before the payee.[15] So in the cause of Tillman v. Wheeler,[16] the defendant's indorsement in blank was obtained by the maker of the note to give him credit with the payee, but of this fact defendant had no knowledge at the time of indorsing the note, and no guaranty appeared thereon, nor was there any proof thereof. It was held that the mere fact that plaintiff parted with his goods upon the credit of this indorsement, could not vary the nature of the actual contract of defendant; that the legal presumption without other evidence was, that the intendment was to merely make himself liable

[8] Cases cited and explained: Nelson v. Dubois, 13 Johns. 175; Herrich v. Carman, 12 John. 159; s. c., 10 John. 224; Lamourieux v. Hewitt, 7 Wend. 307; Joselyn v. Ames, 3 Mass. 274; White v. Howland, 9 Mass. 315; Hunt v. Adams, 5 Mass. 358; read *post de* these cases.

[9] Hall v. Newcomb, 3 Hill, 233; s. c., 7 Hill, 416, which finally settled the distinction observed in this State between blank indorsements of negotiable and non-negotiable notes, decides that such indorser is not liable except on proper demand and notice. See further note 14 below. There must be presentment for payment, and notice of non-payment to hold indorser. Cayuga County Bank v. Warden, 1 N. Y. 413; Seabury v. Hungerhold, 2 Hill, 80; Spies v. Gilmore, 1 N. Y. (1 Comst.) 321, affirming s. c., 1 Barb. 158.

[10] But see Cromwell v. Hewitt, 40 N. Y. (1 Hand), 491. The reporter in his note to this case says: "In all the cases in this court, Moore v. Cross, Richards v. Warring, and the present case, the history and purposes of the indorsement were shown by extrinsic evidence. What the legal import of such an indorsement would be, in the absence of explanatory proof, may, perhaps, therefore, be regarded as not strictly decided in this State." See, also, Houghton v. Ely, 26 Wis. 181; s. c., 7 Am. Rep. 52; Abbott's Trial Ev., 437, note 1.

[11] Coulter v. Richmond, 59 N. Y. 481.

[12] Seabury v. Hungerford, 2 Hill, 81; Ellis v. Brown, 6 Barb. 282; Spies v. Gilmore, 1 N. Y. (1 Comst.) 321.

[13] 19 N. Y. (5 Smith), 227 (1859).

[14] The court continues: "This doctrine was advanced in Herrick v. Carman, 12 John. 160, and was adjudged in Nelson v. Dubois, 13 John. 175, and Campbell v. Butler, 14 John. 349. It was attacked in Dean v. Hall, 17 Wend. 214, and in Seabury v. Hungerford, 2 Hill, 80, and was finally overthrown in Hall v. Newcomb, 3 Hill, 233, and the same case in error, 7 Hill, 416."

[15] Lester v. Paine, 39 Barb. 616.

[16] 17 John., 226 (1820).

as second indorser.[17] Where a promissory note was drawn by A, payable to his own order and indorsed by himself and defendant, and negotiated before maturity for value, and without notice of any defects or illegality in the same, it was held that the contract of indorsement was a guaranty of the genuineness of the signatures of the makers, and

[17] The following is a brief statement of the decisions in New York on this point: Leonard v. Vredenburg, 8 John. 29 (1811). Express guaranty was written, held guarantor if indorsed at inception of note. Herrick v. Carman, 12 Id. 159; S. C., 10 Id. 224 (1815), overruled in Spies v. Gilmore, 1 N. Y. 321, and see note 14, *ante*. *Held*, as guarantor, if indorsed upon a consideration, and subsequent to an inception. It did not appear in this case that the indorsement was made for the purpose of giving the maker credit with the payee. Nelson v. Dubois, 13 Id. 175 (1816), overruled, see note 14, *ante*. Guarantor or maker, if indorsed at inception of note, or an original undertaking as surety. Campbell v. Butler, 14 Id. 349 (1817), overruled, note 14, *ante*; guaranty written over name, held guarantor if indorsed at inception. Cumpston v. McNair, 1 Wend. 457; guarantor, express guaranty overwritten. Lamourieux v. Hewitt, 5 Id. 307. Where note is indorsed in blank it may be filled up on trial. 10 Id. 516. If made before delivery, indorser. Hough v. Gray, 19 Id. 202 (1838). An express guaranty was written on the note, and the court declares that had such indorsement been in blank the guarantor might have been entitled as an indorser to proper demand and notice. Denied in Tinker v. McCauley, 3 Mich. 188, referring to Brown v. Curtis, 2 Comst. (N. Y.) 224; Durham v. Marrow, Id. 533; Brewster v. Silence, 11 Barb. 144; Hall v. Farmer, 5 Denio, 584; 2 Comst. 553, and Weed v. Clark, 4 Sandf. 31. Upon the point that guarantor is liable as maker, to the effect that such doctrine is repudiated and overthrown. Watson v. McLaren, Id. 557. Guaranty was overwritten, held guarantor if indorsed before delivery. Oakley v. Boorman, 21 Id. 589 (1839). Indorsement subsequent to inception and not founded on the same transaction, a guarantor; parol evidence admissible. Douglass v. Howland, 24 Id. 35. Promisor. Ketchell v. Burns, Id. 456 (1840). Circumstances under which indorsement was made may be shown; here there was an express guaranty to a party named, or "bearer;" held, an absolute promise to pay if maker failed to pay. Labrou v. Woram, 1 Hill, 91 (1841.) Indorsed without knowledge of the purposes to which note was applied held liable as second indorser, but *contra*, if indorser had had knowledge. Payne v. Ladue, Id. 116. Parol evidence inadmissible. Prosser v. Luqueer, Id. 256 (1841). Words of guaranty were written; adjudged, that liability was the same as though indorser had signed joint and several note as surety. But in S. C., 4 Id. 420, this judgment was upheld on the ground that Prosser was indorser. Loveland v. Sheherd, 2 Id. 149 (1841). Note was made payable by maker to his own order, and words of guaranty were overwritten. Miller v. Gaston, Id. 188 (1842), decides that where a third party is privy to the consideration then his liability may be that of joint and several promisor. This note was indorsed after delivery to the payee, and after he had indorsed the same. Words of guaranty were overwritten, held liable as guarantor of old note or maker of a new note. Parke v. Brinkerhoff, Id. 663 (1842). To the effect that an absolute guaranty may be written over an indorsement in blank of a non-negotiable note. Seabury v. Hungerford, Id. 84 (1841). Indorser where notes are negotiable, indorsed "backer," liability of indorser will prevail over intention to become otherwise liable. Hunt v. Brown, 5 Id. 145. Guaranty for payment imports consideration, a distinction is made between this and a guaranty for collection. Leggett v. Raymond, 6 Id. 639. Express guaranty written, held liable as indorser upon proper demand and notice. Hall v. Newcomb, 3 Id. 233; S. C., 7 Id. 416. If he can be held liable as indorser he is not a guarantor. Cottrell v. Conklin, 4 Duer, 45, overruled 12 John. 159, as to nature and degree of evidence admissible to change blank indorsement into a guaranty. Bradford v. Corey, 5 Barb. 461. Where one indorses his name on back of note and adds the word "surety," this does not change his liability as indorser. Ellis v. Brown, 6 Id. 282. Indorser. Griswold v. Slocum, 10 Id. 402. Guarantors or maker of non-negotiable note, if not he is not otherwise liable, and indorser when note is negotiable, parol evidence inadmissible. Keeler v. Bastine, 12 Id. 117. Such indorsers are entitled to regular demand and notice. Partridge v. Colby, 19 Id. 258; Waterbury v. Sinclair, 26 Id. 455, and Lester v. Paine, 39 Id. 616, indorser. Bank of Albion v. Smith, 27 Id. 489. Parol evidence inadmissible. Richards v. Warring, 4 Abb. Ct. App. 47 (1 Keyes, 576). On non-negotiable note liable as guarantor or maker. Hahn v. Hall, 2 Abb. Pr. 358. Non-negotiable note. 1 Spence. 256. Indorser. Solomon v. Latimer, 15 N. Y. Sup. Ct. (8 Hunt) 171. Parol evidence in favor of defendant to show that plaintiffs took note under an agreement not to hold indorser, is admissible. Brown v. Curtis, 2 N. Y. 225 (1849); S. C., 2 Barb. 51. One who writes a guaranty on back of note can not be treated as indorser. Spies v. Gilmore, 1 Id. (1 Comst.) 321 (1848). Indorsed before delivery and intending to become security for the maker, liable as indorser, and entitled to demand and notice of non-payment. The question when a demand on maker will be dispensed with, considered. Moore v. Cross, 19 Id. 227 (1859). The payee may indorse without recourse at any stage of the action. Intention of parties should govern, parol evidence admissible; note was indorsed by defendant for the purpose of enabling the maker to obtain credit with the payee, due demand and notice were given at maturity, held liable to payee. Bacon v. Burnham, 37 N. Y. 614 (1868). Such indorsement must have been made knowing that it was necessary for the payee to indorse the note before it could be negotiated; that the order of the names on the note, or even the relative time of making the indorsements made no difference, and did not alter the position of defendant as second indorser, and that the prior indorsers could maintain no suit against him, nor could any one holding under them with knowledge of the facts maintain such suit. A waiver of protest was written on this note and signed by defendant. Cases relied on, are: Herrick v. Carman, Seabury v. Hungerford, Ellis v. Brown and Moore v. Cross, all cited above; Meyer v. Hibscher, 47 N. Y. 265 (1872). Liable as security for the payment of note to payee when indorsed with knowledge that the purpose for which such indorsement was made was to obtain greater security with the payee. Phelps v. Vischer, 50 N. Y. 69 (1872). Indorsed prior to delivery to payee: Held, subsequent indorser in the absence of proof that the intention was to become surety for the maker to the payee. Clothier v. Adriance, 51 Id. 322 (1873). Affirming Moore v. Cross, and Labron v. Woram, above, on the point that note may be indorsed by payee without recourse, when it appears that such indorsement was made for greater security to payee for a note or debt of a third person,

that they could bind themselves by their contract.[18]

In Connecticut, the law on this point was clearly settled among the earliest of its judicial determinations,[19] and the arguments of its courts follow the same analogy of law, and adhere, in their adjudications, closely to precedents. So Forbes v. Howe,[20] defines such indorsement in blank, as a guaranty of the ability of the maker to pay the note when due, that it is collectible by due diligence; and Beardsley, J., decides that, "No preliminary demand upon the makers, if they were insolvent, was necessary to fix the liability of the guarantor. If they were unable to pay the note when it became due, that of itself constitutes a breach of the indorser's contract;" that the fact that the maker had some property is no defense, if it "was not of sufficient value to pay the note, or that he"—the maker—"had parted with it before the note was payable." That where the note was payable on demand, the time when, from the terms thereof and the presumed intention of the parties, it was contemplated that the same should become payable, was an important factor in the question of due diligence; and again, that, "the plaintiff was not required to attach real estate before resorting to the guarantors."[21] In Clark v. Whiting,[22] although not strictly within the class of causes we are contemplating, the circumstances were peculiar. The defendant became the holder of a promissory note, payable at a time certain with interest. While the note was in his hands he received a payment of interest thereon, and wrote upon the back of his note directly over his own name, and at the same time, as follows: "Rec'd one year's interest on the within, May 10th, 1871." It was held, that upon the face of the note he was not liable as an indorser; that his signature must be shown by the plaintiffs by evidence *aliunde*, to be disconnected with the receipt on back of note, in order to hold defendant liable.[23]

In Massachusetts, such irregular indorser is liable merely as promisor, where such note was indorsed before delivery,[24] and before the statute of 1874,[25] which places this contract on much the same footing as it now stands in New York, *i. e.*, that of indorser,[26] and parol evidence is inadmissible "to show that this was not their contract."[27] But if the name was indorsed after delivery to the payee, this seems, in some of the cases, to vary the contract from that of promisor, and

that such indorser was liable as security according to intent, and so, although his indorsement was fraudulently procured. Coulter v. Richmond, 59 Id. 478 (1875). Parol proof admissible; held, liable as first indorser upon proof that such indorsement was made prior to delivery to enable maker to obtain additional security; that it was not necessary that indorser should know exactly the nature of the credit desired; it was sufficient that he knew his indorsement was required for this purpose. 26 Barb. 455. Indorser. Allen v. Rightmere, 20 John. 365, was indorsed by payee and not by third party.

18 Dalrymple v. Hillenbrand, 9 Sup. Ct. (2 Hunt), 488.

19 Bradley v. Phelps, 2 Root, 325 (1796).

20 48 Conn., 413.

21 Citing Welton v. Scott, 4 Conn. 533, on this last point.

22 45 Conn. 149.

23 The principal cases in this State are: Clark v. Merriam, 25 Conn. 575; Thatcher v. Stevens, 46 Id. 561; s. c., 33 Am. Rep. 39; Dale v. Gear, 38 Id. 15; Perkins v. Catlin, 11 Id. 213; s. c., 29 Am. Dec. 282; Douner v. Cheesebrough, 36 Conn. 39.

24 Spaulding v. Putman, 128 Mass. 363; Woods v. Woods, 127 Id. 141; Gilson v. Stevens' Mach. Co., 124 Id. 546. Parol evidence, inadmissible. Bryant v. Eastman, 7 Cush. 113; Pray v. Maine, Id. 253; Riley v. Gerrish, 9 Id. 104. In connection with this last case see Essex Co. v. Edmonds, 12 Gray, 273, decided seven years later. Wright v. Morse, 9 Id. 337; Samson v. Thornton, 3 Met. 275; Richardson v. Lincoln, 5 Id. 203; Union Bank v. Willis, 8 Id. 504. In connection with this case see Ayott v. Smith, 40 Vt. 532; Sumner v. Gay, 4 Pick. 311; Baker v. Briggs, 8 Id. 122; Austin v. Boyd, 24 Id. 64; Pierce v. Mann, 17 Id. 244. The indorsement in this case was made in blank upon the back of the note, by defendant the day after the execution thereof, that the payee might be enabled to get the same discounted at the bank. Upon negotiating the note, payee wrote his name above defendant's; held, that plaintiffs must have taken it as a common indorsed note; that from the facts, an authority to fill out a guaranty over defendant's name did not exist. See Bigelow v. Coulton, 13 Gray, 309, on this last point; this case further says that such liability can not be varied by parol evidence. See, also, Clapp v. Rice, Id. 404; Moies v. Bird, 11 Mass. 436; Draper v. Weld, 13 Gray, 580; Chaffee v. Jones, 19 Pick. 260.

25 Ch. 404. As to the liability of one who indorses a note in blank above signature of payee since statute of 1874, see Nat. Bank of the Commonwealth v. Law, 127 Mass. 72.

26 The statute reads as follows: "All persons becoming parties to promissory notes payable on time, by a signature in blank on the back thereof, shall be entitled to notice of the non-payment thereof, the same as indorsers."

27 Allen v. Brown, 124 Mass. 77 (1878), citing Union Bank v. Willis, 8 Met. 504; Brown v. Butler, 99 Mass 179, and Way v. Butterworth, 108 Id. 509. See, also, Gilson v. Stevens' Mach. Co., 124 Id. 546. Although in Brown v. Butler, the indorsement of payee's administrator appeared on the back of the note above defendant's, and parol evidence was held admissible to show the relative time of making the indorsement. Wright v. Morse, 9 Gray, 337. See notes 28, 31 and 55 *post*.

the legal presumption that exists where the indorsement has no date, *i. e.*, that the name was placed upon the note when made, may be rebutted by parol evidence.[28] So, where the name was written upon the note in the order of second indorser, and it appeared that such liability only was intended, it was said that the indorser was not placed in the position of guarantor or maker merely because the prior indorser's name was a forgery.[29]

Closely following the Massachusett's decisions of those causes of action that arose prior to 1874, the law in Maine interprets such an undertaking to be that of original promisor, where the indorsement was made before delivery to the payee. The principle upon which this conclusion rests is not stated; we have simply the bare *dicta* that such is the law.[30] If a negotiable note has several names upon the back, it is *prima facie* evidence that the indorsements were made in the order of time in which they stand, and the courts distinguish between an indorsement made at inception of note, or subsequent thereto, but prior to payee's indorsement, and one made subsequent to payee's indorsement, holding such indorser liable as promisor in the first instance, as guarantor in the second, if there was an actual consideration; and in the last as subsequent indorser, and further qualifying this distinction by the opinion[31] that: "In the absence of date or proof, the indorsement is presumed to have been made at the inception."[32] It has been further held in this State that the words "without recourse," and "without demand or notice," were words applicable to an indorser and not to a promisor, and were mere surplusage, having no legal effect upon defendant's liability.[33]

[28] See on this point, note 55, *post*. Way v. Butterworth, 108 Id. 509; Abbot's Trial Ev. 439 and notes. In McCornay v. Stanley, 8 Cush. 85, the note was executed Dec. 20th, 1848, and indorsed about Feb. 14th, 1849, after delivery. Defendant was held not liable as promisor. But in Tenney v. Prince, 4 Pick. 385, the note was made payable in 12 months, and indorsed in 9 months after date, and it was held that since some liability was intended to be created, the only one available was that of guarantor. This case came up in 7 Pick. 243, and is cited in Greene v. Shepherd, 5 Allen, 591, and in Ellis v. Clark, 110 Mass. 392. See, also, Union Bank v. Willis, 8 Met. 504; Bickford v. Gibbs, 8 Cush. 155; Benthall v. Judkins, 13 Met. 265. In connection with this last case, see Vinal v. Richardson, 13 Allen, 521, decided five years later.

[29] Howe v. Merrill, 5 Cush. 80. The following summary of cases, together with those already examined, constitute nearly all the Massachusetts decisions on irregular indorsements in blank. Joselyn v. Ames, 3 Mass. 274; Hunt v. Adams, 5 Id. 358; 6 Id. 519; 7 Id. 518; 9 Id. 314; S. C., 4 Am. Dec. 68; liable as original promisor, where such indorser had written special words of surety over name on back; but see Oxford Bank v. Haines, and Wheaton v. Mears, 11 Met. 563; Carver v. Warren, 5 Mass. 545; Ulen v. Kittredge, 7 Id. 233 (denied in Hodgkins v. Bond, 1 N. H. 284); defendant authorized the filling out of a special guaranty over his name, held a guarantor, and it is said that blank indorsement may be filled up by payee with words not inconsistent with the apparent actual intent of the parties, reference being had to the nature of the contract. See on this point, 3 Id. 274; 13 Met. 262, and 4 Pick. 311. White v. Howland, 9 Mass. 314 (See Tinker v. McCauley, 3 Mich. 188). There was an agreement having same as the note, written upon the back thereof, to jointly and severally be holden to payee, held liable as original promisors. Oxford Bank v. Haines, 8 Pick. 423. Guarantor, guaranty was overwritten. Chaffee v. Jones, 19 Id. 260. The note was given in renewal of a former note on which parties were liable jointly as promisor or surety, held promisor; if compelled to pay the note, his remedy against the other makers was as surety. Austin v. Boyd, 24 Id. 64. Supposed to have been made for the same consideration, if made at inception; parol evidence admissible. Union Bank v. Willis, 8 Met. 504. The promise must have arisen, either as a matter of fact or by legal presumption, when the note was made, or such indorser is chargeable as guarantor or surety or not at all, according to the proven facts. McGee v. Prouty, 9 Id. 547, signed as surety by part, parol evidence admissible in behalf of the other signers to show that they were also sureties. Riley v. Gerrish, 9 Cush. 104. Holder may fill up blanks and so charge indorser as original promisor or surety. Hawkes v. Phillips, 7 Gray, 284. Joint promisor, name was written upon the back of note in blank after delivery, according to an agreement so to do, made with the maker before the inception of the note. Clapp v. Rice, 13 Id. 403, indorsed before delivery, the payee subsequently, when the note was delivered, wrote his name above the others, held, that the parties so indorsing before the payee were not liable as joint makers; citing Pierce v. Mann, 17 Pick. 244; and in connection with the last case, see Pearson v. Stoddard, 9 Gray, 199; Prescott Bank v. Caverly, 7 Id. 217. In Pearson v. Stoddard, the words "waiving demand and notice," were held not to change the liability as maker, of one whose name was written on back of note, below that of payee's, and that parol evidence was admissible to show when defendant signed the note, and this is the effect of the decision in Brown v. Butler 99 Mass. 179; Slawson v. Loring, 5 Allen, 340; Fitzburg Bank v. Greenwood, 2 Id. 434; Dubois v. Mason, 127 Mass. 37, follows Bigelow v. Colton.

[30] Woodman v. Boothby, 66 Me. 389, citing Martin v. Boyd, 11 N. H. 385, and Austin v. Boyd, 24 Pick. 64.

[31] Barrow, J., in Sturtevant v. Randall, 53 Me. 149.

[32] In addition to many cases already given, the court cites: Samson v. Thornton, 3 Met. 275; Richardson v. Lincoln, 5 Met. 201.

[33] Childs v. Wyman, 44 Me. 441; Lowell v. Gage, 38 Id. 35; Rice v. Cook, 71 Id. 559, was an action on three promissory notes. The first was signed on the face by the maker as principal, and by defendant as surety. The liability was held to be that of promisor; citing Hughes v. Littlefield, 18 Id. 400. The third was signed on the back by defendant, held liable as promisor. Defendant's liability on the second note was not contested. Malbon v. Southard, 36 Id. 147; Leonard v.

In California we have Riggs v. Waldo,[34] which seems to stand uncontradicted down to the present time as the law of that State. The principles of the common law are therein referred to substantially to the effect that the intent of one who indorses in blank out of the regular order, is to govern. That originally the words guarantor and indorser implied the same undertaking, and that the distinctions were more nice than learned; or, to use the words of Fields, J., in Brady v. Reynolds,[35] in his explanation of this case: "There are words, it is true, in the opinion, which lead to the inference that the distinguished judge who delivered it, considered the distinction between the undertaking of an indorser and that of a guarantor, more nice and subtle than solid and just. In this we may differ from him, for we are disposed to regard the undertaking of the two as materially different. The contracts of both are conditional, but their conditions are unlike; the contract of indorsement is primarily that of transfer; the contract of guaranty is only that of security. * * * * The case only decides that notice of protest is equally necessary to fix the liability of a guarantor as to fix that of indorser." In regard to the last statement, the question of a like notice being necessary to fix both guarantor and indorser, is the only one really determined in their decisions on the point we are considering.[36]

In Wisconsin, where a third party indorsed a non-negotiable note in blank, that additional credit might thereby be obtained with the payee, his liablity was deemed to be that of original promisor;[37] and in a case of a negotiable note indorsed in blank for the same purpose, it was held that upon demand at maturity, and protest, the indorser was liable as such.[38]

In New Jersey the law is fully expounded in Hayden v. Weldon.[39] The note in suit was indorsed in blank by the defendant after its delivery to the payee, but before his indorsement thereof, and it was declared that extrinsic evidence must be resorted to, to ascertain the intention of the defendant in so indorsing. That "the circumstances may show a party to such irregular indorsement to be either a surety or joint maker, or guarantor, or he may be held as a second indorser."[40] That a party could not be held as joint maker who was not privy to the consideration of the note, or had no share in the creation of the original debt; that it did not appear that any understanding or expectation existed on the part of either of the parties to the note, at the time the same was delivered, that additional security should be obtained in the maker's behalf; nor did the indorsement conduce, as a matter of fact, to the obtaining of additional credit by the maker with the payee. It was therefore adjudged that: "In order to charge him in that capacity, his credit should have been so involved in the original transaction, that the contract under which the payee parted with his property or rights, was not in the contemplation of the parties, complete without the name of Potter as surety."[41]

In Michigan, such indorser is liable as joint promisor, "in the absence of controlling facts" to the contrary, if he writes his name on the back of the note at its inception.[42] So, in In-

Wildes, Id. 265; Adams v. Hardy, 32 Id. 339. Irish v. Coulter, 31 Id. 237; Colburn v. Averill, 30 Id. 310.

34 2 Cal. 485.

35 13 Cal. 32.

36 Geiger v. Clark, 13 Cal. 580, and so on down and including Jones v. Goodwin, 39 Id. 493; s. c., 2 Am. Rep. 475.

37 Gorham v. Ketchum, 33 Wis. 427; Houghton v. Ely, 26 Id. 181; s. c., 7 Am. Rep. 52.

38 King v. Ritchie, 18 Wis. 582; Snyder v. Wright, 13 Id. 771 (689); Heath v. Van Cott, 9 Id. 469 (517). But see Cady v. Shepherd, 12 Id. 713 (640); Davis v. Barron, 13 Id. 254 (228); Crosby v. Rout, 16 Id. 646 (617); Fords v. Mitchell, 15 Id. 334 (305). Parol evidence is admissible to any such contract. Charles v. Denis, 42 Id. 56. For definition of contract of surety, see Day v. Elmore, 4 Id. 214 (190); Mallory v. Lyman, 3 Id. (Pin.) 443; Id. 674; Ten Eyck v. Brown, Id. 452. As to distinction between liability of indorser and that of guarantor or surety, see Gibbs v. Canon, 9 Serg. & R. 198; s. c., 11 Am. Dec. 703; Brady v. Reynolds, 13 Cal. 32; Bradford v. Corey, 5 Barb. 461; Hall v. Newcomb, 7 Hill, 16; Spies v. Gilmore, 1 N. Y. (1 Comst.) 321; Lequeer v. Prosser, 1 Hill, 256, holds the obligation of surety and guarantor identical.

39 14 Vroom, (43 N. J. L.) 128.

40 Citing Chaddock v. Vanness, 6 Vroom, (35 N. J. L.). 517.

41 Relying on Moies v. Bird, 11 Mass. 436; Tenney v. Prince, 4 Pick. 387; McCorney v. Stanley, 8 Cush. 85.

42 Sibley v. Muskegan Nat. Bank, 41 Mich. 196; Herbage v. McEntire, 40 Id. 337; s. c., 29 Am. Reports, 36; Pain v. Packard, 13 Johns. 174, commented upon as "a clear departure from the common law," in regard to liability of surety, in Inkster v. First Nat. Bank of Marshall, 30 Mich. (8 Post,) 143, which decides that one who signs upon the face of a note can not limit his liability by adding the word "surety" to his name. In Tinker v. McCauley, 3 Id. (Gibbs) 143, most of the authorities are reviewed at length, and Higgins v. Watson, 1 Id. (1 Mann,) 420, is overruled.

diana, if signed before delivery, then promisor or surety.[43]

The same doctrine is true in Maryland,[44] Minnesota,[45] Missouri,[46] Texas[47] and Rhode Island.[48] In Pennsylvania, such party is held as joint and several maker, if not indorser.[49] In Virginia the obligation is that of guarantor or maker, if indorsed at inception, and "proof of intent to subscribe strictly as indorser, and not to be liable only as such, is not to be received." But with this exception, parol evidence to show the exact contract and intendment of the parties is admissible.[50] In New Hampshire the indorser is bound by a like rule of construction.[51] So, in Vermont, words of guaranty were written over the indorser's name, and it was said that the indorsement simply warranted that the note could be collectible by the use of legal diligence; that the contract was not absolute, but merely conditional upon the maker's inability to pay the note within the time limited by the guaranty, and that he was not obligated as indorser.[52] In Alabama, the person so writing his name upon the back of a note before it comes into the payee's hands, is regarded by the courts as an indorser.[53] The judgment rendered upon an action brought in Illinois against one who had so indorsed in blank, a promissory note payable to the order of the maker, was, that the party should be deemed a second indorser in the absence of date or other evidence showing a different intent.[54] But such evidence is not admissible against a *bona fide* transferee for value without notice.[55] The effect of an irregular indorsement in blank is further considered in the authorities hereto appended.[56]

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[43] Drake v. Markel, 21 Ind. 433, overruling Cecil v. Mix, 6 Id. 478.

[44] Ives v. Bosley, 35 Md. 262; s. c., 6 Am. Reports, 411; Culbertston v. Smith, 52 Id. 628; s. c., 36 Am. Reports, 384.

[45] Peckham v. Gilman, 7 Minn. 446.

[46] Baker v. Block, 30 Mo. 229; Goode v. Jones, 9 Id. 876.

[47] Carr v. Rowland, 14 Tex. 275.

[48] Although the payee knew the intendment to be only that of surety, this does not entitle the indorser as such co-promisor, to notice of non-payment by the other maker. Carpenter v. McLaughlin, 12 R. I. 270; s. c., 34 Am. Rep. 638; Perkins v. Barstow, 6 R. I. 505.

[49] 11 Pa. St. 482.

[50] Burton v. Hansford, 10 W. Va. 470; s. c., 27 Am. Rep. 571, and note 580; Orrick v. Colston, 7 Gratt. 189.

[51] Currier v. Fellows, 27 N. H. 369; Sargent v. Robbins, 19 Id. 572; Badger v. Barnaby, 17 Id. 120; Martin v. Boyd, 11 Id. 385.

[52] Hammond v. Chamberlain, 26 Vt. 406. The cases here generally hold such indorser liable as maker, subject to having the real understanding upon which he indorsed explained by parol evidence; that the fact that the indorsement was made even a long time after delivery, is immaterial, though in the case relied on the payee had not indorsed when defendant wrote his name on the note. Sylvester v. Downer, 20 Id. 355; Sanford v. Martin, 17 Id. 285; s. c., 14 Id. 228; Nash v. Skinner, 12 Id. 219; Foster v. Barney, 3 Id. 60.

[53] Hooks v. Anderson, 58 Ala. 238; s. c., 29 Am. Rep. 745. But see Branch Bank v. James, 9 Ala. 949.

[54] Kayser v. Hall, 85 Ill., 511; s. c., 28 Am. Rep. 624. But see Webster v. Cobb, 17 Id. 459; Dietrich v. Mitchell, 43 Ill. 40; Carroll v. Weld, 13 Id. 682; Blatchford v. Milliken, 35 Id. 434.

[55] So decided in Thacher v. Stevens, 46 Conn. 561; s. c., 33 Am. Rep. 39; and see Dubois v. Mason, 127 Mass. 37; s. c., 34 Am. Rep. 335. Generally as to the admissibility of parol evidence in cases of this kind, we refer to Hill v. Ely, 5 Serg. & R. 363; s. c., 9 Am. Dec. 376, and note 381. The conclusion of this note is that "The weight of authority in America seems to be decidedly against the admissibility of the evidence except under special circumstances, where it affects the consideration of the transfer or the good faith of the parties as indicated," in Dale v. Gear, 38 Conn. 15. Though in the note to Daniel v. McRae, 2 Hawk. 590; s. c., 11 Am. Dec. 787, note 792, it is said, "There is strong authority as well as sound reason for the doctrine that any two successive indorsers in blank may vary the liability existing between them by a contemporaneous parol agreement. * * But * * the majority of cases seem to hold that their mutual liability can not be thus varied." Rhodes v. Risley, N. Chip. 44; s. c., D. Chip. 52; s. c., 1 Am. Dec. 696; Barrows v. Lane, 5 Vt. 161; s. c., 26 Am. Dec. 293; Johnson v. Martinus, 4 Halst. 144; s. c., 17 Am. Dec. 464. Overruled in Chaddock v. Vanness, 35 N. J. L. 517; Martin v. Cole, *post*, and Johnson v. Ramsey, 43 N. J. L. (14 Vroom.) 279; Miner v. Robinson, 1 D. Chip. 392; s. c., 12 Am. Dec. 694; Martin v. Cole (given in full in 14 Cent. L. J. 46), U. S. S. C., October Term, 1881. The opinion of Mr. Justice Matthews is a most learned and exhaustive one on this point.

[56] Perkins v. Catlin, 11 Conn. 213; s. c., 29 Am. Dec. 282, and note 297; Fitzhugh v. Love's Ex'rs., 6 Cal. 5; s. c., 3. Am. Dec. 568 and note 571; Fuller v. McDonald, 8 Green, 213; s. c., 23 Am. Dec. 499; Abbott's Trial Ev. 436, *et seq.*; 1 Parsons on Cont. 243, 251 and notes; 3 Kent's Com. 91; Story on Promissory Notes, secs. 58 *et seq.*, 133, 215, 459, 468 to 480; Chitty on Bills, 266, 561; Brandt on Suretyship and Guaranty (ed. 1878), secs. 147-156, inclusive; Cromwell v. Hewitt, 40 N. Y. (1 Hand.) 491, and note.

## BOOKS OF SCIENCE AS EVIDENCE.

It may be laid down as a general rule that a book published by a private person, involving statements of recent facts, can not, unless as against the author, be received as evidence of the facts stated therein. To prove such facts the author must be called, when he is

within reach of the process of the court.[1] But where the author is out of reach of such process, then a book of history, travels or chronicles is admissible for what it is worth, so far as it concerns facts out of the memory of living men.[2] And, as a general rule, any approved public and general history (and of the fact of public approval the court will take judicial notice) is admissible to prove ancient facts of a public nature, either at home or abroad.[3]

But it is more particularly the use of books of science as evidence of which we propose to speak.

Greenleaf says: "There is a great want of symmetry in the law in regard to the admission of books of art and science to be read before the court or jury in order to establish the laws or rules of a particular art or profession," and that "the rule seems well settled that such books are not to be read before the jury either as evidence or argument."[4]

Wharton says: "For several reasons, treatises on such of the inductive sciences as are based on *data* which each successive year corrects and expands, must be refused admission when offered to prove the truth of facts contained in such treatises. In the first place, a sound induction last year is not necessarily a sound induction this year, and, as a matter of fact, works of this class, when they do not become obsolete, are altered in material features from edition to edition, so that we can not tell, in citing from even a living author, whether what we read is not something that this very author now rejects. In the second place, if such books are admitted as a class, those which are compilations must be admitted as well as those which contain the result of original research; the purely speculative must come in side by side with the empirical; so that if such treatises are admitted at all, it will be impossible to exclude those which are secondary evidence of the facts they state. In the third place, such books, without expert testimony, can not generally be pointed to the concrete case; with expert testimony, they become simply part of such testimony, and lose their independent substantive character as books. In the fourth place, the authors of such books do not write under oath, and hence write often tentatively; nor are they examined under oath, and hence the authorities on which they rest can not be explored, nor their processes of reasoning tested. Lastly, such books are at best hearsay proof of that which living witnesses could be produced to prove. Books of this class, therefore, though admissible, if properly authenticated, to prove the state of science at a particular epoch, are inadmissible as independent substantive evidence, to prove the facts they set forth.[5] In an argument to a court, such books can indubitably be read, not as establishing facts (unless such books are regarded as matters of notoriety, as are ordinary dictionaries), but as exhibiting distinct processes of reasoning which the court, from its own knowledge, as thus refreshed, is able to pursue."[6]

A brief reference to some of these cases may be of interest as furnishing illustrations of the application of the rule. Collier v. Simpson,[7] is one of the earliest cases and has been much cited. It was an action for words charging plaintiff with malpractice as a physician. It was proposed to show that certain prescriptions were proper and the doses not too large, and Wilde, Sergeant, offered to put in evidence medical books of authority to show what was the received opinion in the medical profession. Tindal, C. J.: "I think I can not receive medical books." Wightman: "When foreign laws are to be proved, it frequently happens that a witness produces

[1] Whiton v. Ins. Co., 109 Mass. 31; Morris v. Harmer, 7 Pet. 554; United States v. Jackalon, 1 Black (U. S.), 484; Fuller v. Princeton, 2 Dane Ab. Ch. 48; Morris v. Edwards, 1 Ohio, 524.

[2] Morris v. Harmer, *supra;* Missouri v. Kentucky, 11 Wall. 395; Bogardus v. Trinity Church, 4 Sandf. Ch. 633; State v. Wagner, 61 Me. 181; McKinnon v. Bliss, 21 N. Y. 206; affirming s. c., 31 Barb. 190.

[3] 1 Wharton's Ev., sec. 664; State v. Wagner, 61 Me. 188; Missouri v. Kentucky, 11 Wall. 395.

[4] 1 Greenl. Ev., sec. 497, n.

[5] Citing Collier v. Simpson, 5 C. & P. 73; Terry v. Ashton, 34 L. T. 97; Ashworth v. Kittridge, 12 Cush. 193; Washburn v. Cuddihy, 8 Gray, 430; Whiton v. Ins. Co., 109 Mass. 24; State v. O'Brien, 7 R. I. 336; Harris v. R. Co., 3 Bosw. (N. Y.) 7; Spalding v. Hedges, 2 Pa. St. 240; Yoe v. People, 49 Ill. 410; Carter v. State, 2 Ind. 617; Gehrke v. State, 13 Tex. 568; Fowler v. Lewis, 25 Tex. 381. Also, as indicating a contrary practice, see Ordway v. Haynes, 50 N. H. 159; Bowman v. Woods, 1 Greene (Iowa), 441; Bowman v. Torr, 3 Iowa, 571; Brodhead v. Wiltse, 35 Iowa, 429 (by statute); Cory v. Silcox, 6 Ind. 39; Luning v. State, 1 Chand. (Wis.) 264; Ripon v. Bittel, 30 Wis. 614; Stoudenmeier v. Williamson, 29 Ala. 558; Merkle v. State, 37 Ala. 139.

[6] Wharton's Ev., sec. 665.

[7] 5 C. & P., 73.

a foreign law book, and states it to be a book of authority." Tindal, C. J.: "Physic depends more on practice than law. I think you may ask a witness whether in the course of his reading he has found this laid down." Sir H. Halford, the President of the College of Surgeons was called. He stated that he considered the medicine proper, and that it was sanctioned by the books of authority. He stated that the writings of Dr. Merriman and Sir Astly Cooper were considered of authority in the medical profession. Tindal, C. J.: "I do not think the books themselves can be read, but I do not see any objection to your asking Sir H. Halford his judgment and the grounds of it, which may be in some degree founded upon books as a part of his general knowledge."

Washburn v. Cuddihy,[8] was an action for breach of warranty on sale of a horse, the breach alleged being that the horse was addicted to the vice of "cribbiting." On the trial counsel undertook to read from Dodd's Veterinary Surgeon as to the nature of the habit, and as to whether it constituted a breach of the warranty, but was stopped by the court, which held such matter inadmissible. This case has been the subject of much comment because the Supreme Court, in passing upon it, while holding such books inadmissible before the jury, still cite them as authority upon the same questions involved in the trial below. Similar cases are Darby v. Ouseley,[9] and Fowler v. Lewis.[10] Commonwealth v. Wilson,[11] was a criminal case in which the defense of insanity was interposed. Counsel for the defendant proposed to read to the jury, from works of established reputation, definitions of insanity. In the Supreme Court, Shaw, J., held such books inadmissible, saying: "Facts or opinions on the subject of insanity, as on any other subject, can not be laid before the jury, except by the testimony under oath of persons skilled in such matters. Whether stated in the language of the court, or of the counsel in a former case, or cited from the works of legal or medical writers, they are still statements of fact, and must be proved on oath."

In Whiton v. Insurance Co.,[12] counsel offered to read from Appleton's American Cyclopædia an article on the subject of guano in the islands of the Carribean Sea, to show the character and repute of the Island of Navassa as a guano island, but it was not permitted. The Supreme Court say: "The defendants were also rightly refused permission to read to the jury an article in Appleton's Cyclopædia. A book published in this country by a private person is not competent evidence of facts stated therein of recent occurrence, and which might be proved by living witnesses, or other better evidence, and the book in question not being shown to have been approved by any public authority, or to be in general use among merchants or underwriters, has no tendency to show that the Island of Navassa was commonly called and known as a guano island." [13]

In Carter v. State,[14] the court held that while medical books are not admissible in evidence, medical men may give their opinions as witnesses, which opinions may, in a measure, be founded on standard medical books as a part of their general knowledge.

In Yoe v. People,[15] a criminal case, it was held to be error to allow the State's attorney, against the objection of the prisoner, to read to the jury copious extracts from medical works which had not been introduced in evidence, nor proved by any witness to be an authority, and to state to the jury that what he read was authority upon the subject of poison by arsenic.

In State v. O'Brien,[16] the court follow the same rule, saying: "The book (Taylor's Medical Jurisprudence) offered to be read to the jury, was not admissible as evidence. No evidence in the nature of parol testimony could properly pass to them except under the sanction of an oath; and, upon this ground, works of science are excluded, notwithstanding the opinion of scientific men that they are books of authority and valuable as treatises. Scientific men are admitted to give their opinion as experts because given under oath; but the books which they write are, for want of such an oath, excluded."

We will next examine some of the cases

[8] 8 Gray, 430.
[9] 1 H. & N., 12.
[10] 25 Tex. 380.
[11] 1 Gray, 337.
[12] 109 Mass., 24.
[13] Citing Fuller v. Princeton, 2 Dane Ab. 333; Morris v. Edwards, 1 Ohio, 189; Morris v. Harmer, 7 Pet. 554, Houghton v. Gilbart, 7 C. & P. 701.
[14] 2 Ind., 617.
[15] 49 Ill., 410.
[16] 7 R. I. 336.

which are sometimes referred to indicating a different rule. Such an one is Ripon v. Bittel,[17] but critical examination shows this to be a well recognized exception to the general rule, rather than a pronounced departure from it. In this case, a witness in his testimony, to corroborate his own statement, asserted that certain books laid down the same doctrine, and it was held that the books were admissible to discredit the witness, by showing that they did not contain such doctrine. Similar to this is the very recent case in Michigan, Pinney v. Cahill.[18] In this case, an expert, after stating his opinion, testified that he was supported in it by all works of good authority, and that the "Modern Horse Doctor, by Dr. Dodd," was a work of that kind. The opposite party then offered to show from this work of Dr. Dodd, that it laid down different doctrines, and the circuit court admitted it. In the Supreme Court, Graves, J., says: "This evidence was offered to discredit this expert in connection with his cross examination. The rule is acknowledged in this State, that medical books are not admissible as a substantive medium of proof of the facts they set forth. But the matter in question was not adduced with any such view. The witness assumed to be a person versed in the veterinary science; to be familiar with the best books which treat of it, and among others, with the work of Dodd. He professed himself qualified to give an opinion to the jury from the witness stand, on the ailment of the plaintiff's horse and its cause, and the drift of his opinion was to connect the defendant with that ailment. He borrowed credit for the accuracy of his statement on referring his learning to the books before mentioned, and by implying that he echoed the standard authorities like Dodd. Under the circumstances, it was not improper to resort to the book, not to prove the facts it contained, but to disprove the statement of the witness, and to enable the jury to see that the book did not contain what he had ascribed to it. The final purpose was to disparage the opinion of the witness, and hinder the jury from being imposed upon by a false light. The case is a clear exception to the rule which forbids the reading of books of inductive science as affirmative evidence of the facts treated of."[19] In Luning v. State,[20] an earlier Wisconsin case than Ripon v. Bittell, had held that the admission or rejection of such books rested in the discretion of the court. Ordway v. Haynes,[21] is also cited as opposed to the general rule, but in reality is not. A chalk anatomical sketch was to be used before the jury, and it was held that simply as an illustration it was admissible, but that to admit it with the statement that it was a copy from a book by a certain eminent medical author, was error. So, in Cory v. Silcox,[22] "Evan's Wheelwright's Guide" was permitted to be read to the jury by way of illustration merely, but the court charged the jury that "extracts read from a scientific work are not of authority, conclusively or *prima facie*."

But there are two States in which a contrary rule prevails,—Iowa and Alabama. In Bowman v. Woods,[23] such books were held anmissible as evidence, and the statute expressly makes them them so.[24] Broadhead v. Wilste[25] also lays down the same rule, but bases it solely on the statute. Alabama, however, bases her rule on the "reason of the thing." In Stoudenmeir v. Williamson,[26] the court say: "We think that medical authors whose books are admitted or proven to be standard works with that profession, ought to be received in evidence;" and this rule was subsequently followed in Merkle v. State.[27]

An expert, when testifying as to the opinion of his profession upon a certain point, may cite authorities as agreeing with him, and it has been held that he may refresh his memory by referring to the authorities.[28] But such expert should state the matter as his opinion, and not read extracts from the books.[29]

In regard to works upon the exact science,

17 30 Wis. 614.
18 12 N. W. Rep. 862.
19 Citidg Ripon v. Bittell, 30 Wis. 614; Wharton's Ev., sec. 666.
20 1 Chand. (Wis.) 264.
21 50 N. H. 159.
22 6 Ind. 39.
23 1 Green (Iowa) 441.
24 Iowa Rev. Stat., sec. 3995.
25 35 Iowa, 429.
26 29 Ala. 558.
27 37 Ala. 139.
28 Ripon v. Bittell, 30 Wis. 614; Collier v. Simpson, 5 C. & P. 74; Harvey v. State, 40 Ind. 516; Sussex Peerage, 11 C. & F. 85; 8 Jur. 793.
29 Cocks v. Purday, 2 C. & K. 270; Commonwealth v. Wilson, 1 Gray, 337; Commonwealth v. Sturtivant, 117 Mass. 122.

the rule is different. Books of this class, such as the Carlisle and Northampton Life Tables, Interest Tables and the like, sworn to by their authors, or where their authors are out of reach, shown to have been accepted as authoritative by those dealing in business with the particular subject, are admissible in evidence. [30]

F. R. MECHEM.

Battle Creek, Mich.

[30] Wager v. Schuyler, 1 Wend. 553; Schell v. Plumb, 55 N. Y. 598; Mills v. Catlin, 22 Vt. 106; Baltimore R. Co. v. State, 33 Md. 532; Donaldson v. Railroad, 18 Iowa, 280; David v. Railroad, 41 Ga. 223.

## FEDERAL ELECTION LAWS CONSTRUED—LIMITS OF FEDERAL POWER—PLEADING.

### UNITED STATES v. CAHILL.

*United States Circuit Court, Eastern District of Missouri.*

1. Where an indictment charges intimidation of "a qualified voter," it is not essential that all the facts showing the voter's qualification should be set forth, though they must be proven at the trial.

2. Under the United States Constitution, no Federal statute can interfere with voters except at an election for representative in Congress, and then only as to their protection in voting for such representative.

3. An indictment under the Federal election laws, must affirmatively state the facts necessary to the exercise of Federal jurisdiction.

Indictment for intimidation of voter. Demurrer to indictment.

*Wm. H. Bliss*, U. S. District-Attorney, for the Government; *Shepard Barclay*, for defendant.

TREAT, District Judge, delivered the opinion of the court:

The demurrer is special to each of the two counts, viz:

First—The facts on which depended the right of Batton to vote are not set out.

Second—There is no allegation that the election was for a representative in Congress.

The indictment is designed to charge an offense, under section 5511 U. S. Rev. Stat., for unlawfully preventing a qualified voter from freely exercising the right of suffrage, etc.

It is contended by defendant that it is not sufficient in an indictment to charge generally that the person whose vote was refused, or who was prevented from voting, was "a qualified voter," but that the several facts on which his right to vote depended should be set out. Reference has been made to several authorities in support of the proposition. While it may be conceded that where a person offering to vote sues an officer of election for refusing his vote, or where he is the party plaintiff whose right of action is dependent on his legal qualification, he should set out the facts on which his qualification rests; yet that rule does not apply where, as in this case, the defendant is not the voter, but a defendant in a criminal proceeding against him for unlawfully interfering with the voter. It will devolve on the United States at the trial to show affirmatively that Batton was a legally qualified voter entitled to cast his vote for a representative in Congress at the election named, but the detailed facts on which his qualification depends need not be averred in the indictment.

The other ground of demurrer is well taken. True, an indictment, using the same terms, was before the United States Supreme Court, but its attention was not directed to the point now under consideration, nor does it appear what, in that case, was the full language of the count.

It is clear that no Federal statute can interfere with voters except at an election for representative in Congress, and then only as to their protection in voting for a representative in Congress. Hence it is essential that it be charged in the indictment that "at an election for representative," etc., the offense was committed; and it is not sufficient to allege that "at an election at which a representative was voted for," etc. It may be that the election in question was for some other purpose over which the Federal government had no control, and with which it had no right to interfere. But the defect is still graver when it is averred that at an election where a representative was voted for, Batton was a qualified voter, etc., and entitled to vote, and that when proceeding to offer and deposit his ballot, he was prevented by threats and intimidation, yet nowhere is it alleged that he offered, or proposed, or was about to vote for, or was qualified to vote for a representative in Congress.

It would hardly be contended that because Congress may pass a law to control congressional elections and protect voters against unlawful or violent interference with their right to vote for congressional representatives, therefore whatever occurred at an election which did not interfere with such a right must be considered within the terms of the act, because the words are general, viz: "Unlawfully prevents any qualified voter of any State * * * * from freely exercising the right of suffrage," etc. The language must necessarily be so construed as to confine the provisions of the statute within constitutional limits.

There was a suggestion made by defendant's counsel in argument as to the so-called threat as set out in the second count, but as the special demurrer raises no such point, the court does not pass upon it. It may be that the specific language should be construed as qualifying the general averment; and if, without further averments, the specific language was not an unlawful threat, the indictment would fall.

While it is of great importance that purity of elections and the free exercise of the right of suffrage be enforced in all cases, yet it is equally important that there be no usurpation of jurisdiction, one tribunal with another. So far as the act of Congress takes supervision of elections for representatives in Congress, there is no difficulty as to Federal jurisdiction; yet there may be mixed elections, or elections at which local officers alone are to be voted for.

If, at a mixed election, a voter appears to cast his ballot solely for a State or municipal office and is interfered with in his attempted exercise of that privilege, or if, under the State law, he is qualified to vote for local officers and not for a representative in Congress, and is interfered with, does the act of Congress apply? Hence, should not the indictment specify that the election was for a representative in Congress, that the voter was qualified to vote for a representative at the time and place averred; that said qualified voter appeared at the polls and offered or attempted to vote for a representative in Congress; and that he was unlawfully interfered with in such attempted exercise of that specified right?

If this be not so, then the Federal jurisdiction must be held to extend to whatever local elections are held at which any one casts a vote for a representative in Congress, whether the election be for that purpose or not; and that if, at such an election, a vote is cast for such a representative, any one who appears to vote for a local officer can not have his vote challenged without incurring the penalty of the Federal law.

These extreme cases are stated to illustrate the position that the indictment must contain needed averments to bring the alleged offense within the Constitution and laws of the United States.

The court holds that the offense must be charged to have been for interference "at a congressional election" with a voter qualified to vote and offering to vote for a representative in Congress.

The demurrer is sustained.

[NOTE BY ED.—In consequence of the above decision, the District Attorney dismissed the above case against CAHILL, and all the other pending indictments and informations for violations of the Federal election laws at the general election of 1880, in the 3d Congressional District of Missouri.]

## CONTRACT — SPECIFIC PERFORMANCE — CERTAINTY.

### HEBERT v. MUTUAL LIFE INS. CO.

*United States Circuit Court, District of Oregon, July* 19, 1882.

1. Equity has jurisdiction to enforce the performance of a contract to deliver a policy of insurance, and having taken jurisdiction for that purpose, will, in case there has been a loss or death, retain it for the purpose of decreeing payment of the policy.

2. A contract to issue a plain life insurance policy upon the life of the applicant for $15,000, payable to his wife, according to the form in use by the company, is sufficiently certain to be enforced; and if there is any extrinsic reason why it should not be enforced, as that it was procured by fraud or falsehood, it must be set up as a defense.

*Wm. H. Holmes*, for plaintiff; *Thos. N. Strong*, for defendant.

DEADY, J., delivered the opinion of the court:

This suit is brought to enforce a contract for the delivery of a life insurance policy for the sum of $15,000, and for a decree that the defendant pay the same to the plaintiff.

The bill alleges that the defendant, on June 11, 1878, and since, was, and has been a corporation organized under the laws of New York, and doing a life insurance business in Oregon; that on said day, Oliver Hebert, of Marion County, Oregon, the husband of the plaintiff, applied to the agents of the defendant in said county for insurance upon his life of $20,000, payable to the plaintiff, and paid them the first quarter's premium thereon, to-wit: $105.60, which sum was by them forwarded to the defendant upon the condition "that if the amount of the risk should be reduced a proportionate share of the premium should be refunded," and if the whole application should be rejected it would all be refunded; that subsequently the defendant rejected $5,000 of said application, and on August 26, 1878, remitted to said Hebert $26.40 of said payment, and "accepted, received and retained" the remaining $79.40 as the premium upon the first quarter of such insurance, and in consideration thereof "did insure the life of said Hebert from such time in the sum of $15,000," payable upon the death of said Hebert to the plaintiff; and also agreed "to issue and deliver unto said Hebert a 'plain life insurance policy' upon his own life according to the customary form adopted and in use by the defendant for said sum payable as aforesaid," which agreement it has hitherto neglected and refused to perform; that about September 8, 1878, at said county, said Hebert died, and the plaintiff thereupon demanded of the defendant said policy and the payment of said insurance, which was refused; and that, by reason of the refusal to issue said policy, the plaintiff is unable to "enforce her rights in an action at law," wherefore she brings this suit and prays the defendant may be required to deliver to her "a plain life insurance policy" upon the life of said Hebert for the sum aforesaid, to take effect from the date of the contract aforesaid, and payable to the plaintiff, and for a decree against the defendant for said sum of $15,000, with interest.

The defendant demurs to the bill, because: (1), The plaintiff upon the case stated is not entitled to the relief prayed for; (2), The policy is not sufficiently described; and (3), The plaintiff has an adequate remedy at law.

The jurisdiction of a court of equity to compel the specific performance of a contract for insurance is well established. The policy can not be obtained by an action at law, although one might be maintained upon it for the insurance after it is issued. But a court of equity having taken jurisdiction for the purpose of compelling the delivery of the policy, will retain it where there has been a loss or death for the purpose of decreeing payment of the policy, both to avoid expense and because the latter relief is a mere incident of the former. Angell on F. & L. Ins., sec. 34; Perkins v. Washington Ins. Co., 4 Cow. 645; Carpenter v. M. S. Ins. Co., 4 Sand. Ch. 408; Brigger v. S. I. Ins. Co., 5 Saw. 304.

Nor does there appear to be any uncertainty, as to the nature of the contract or the form or effect of the policy, as stated in the bill. The agreement was for "a plain life insurance policy" upon the life of the deceased for $15,000, payable to the plaintiff "according to the customary form adopted and in use by the defendant," for which it was paid and had received one quarter's premium.

If there is any reason not appearing on the face of the bill why the defendant should not be compelled to perform its contract, as that it was procured by fraud or falsehood, the defendant can set it up as a defense.

The demurrer is overruled.

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## RUNAWAY TEAM—NEGLIGENCE—EVIDENCE—PLEADINGS.

### MOULTON v. ALDRICH.

*Supreme Court of Kansas, July Term*, 1882.

1. Where a person lawfully at work upon a public street of a city, without fault on his part, suffered damages from a team harnessed to a baggage wagon running away: *Held*, that the owners were liable, it appearing that their driver and servant were negligent in leaving the team standing on the public street insecurely hitched and unattended while he was carrying a trunk from the wagon to a house twenty or thirty feet distant.

2. It is not necessary that a team of horses should have vicious propensities, or be of restive disposition to make the owner responsible for injury by it through the negligence of his servant, nor will proof that the servant is a careful and prudent man, of sober and steady habits and competent to discharge the duties incumbent upon him in his employment, necessarily relieve his employer of liability for injury resulting from the servant's negligence in the line of his employment.

3. Where the findings of a jury are to the effect that the plaintiff received injuries on a public street of a city from a team running away, which had been negligently left standing on the street by the driver unattended and insecurely hitched, and a general verdict for damages is rendered by the jury in favor of the plaintiff against the defendants having in their employment the driver, the defendants are not exonerated from liability by other findings that the team had no vicious propensities, were gentle and quiet and well adapted for the purpose it was being used, and that the driver was a careful, prudent man, of sober, steady habits, and competent to discharge the duties incumbent upon him.

4. Negligence is not imputable to a person for failing to discover an approaching danger when, under all the circumstances, the person sought to be charged with negligence has no reason to suspect any danger is to be apprehended.

5. Where a person engaged in hauling dirt with a team and wagon, along the side of the traveled part of a public street of a city, after depositing his load drove his team upon the traveled portion of the street, which was from twenty-five to thirty feet wide, and after he had driven about forty or fifty feet upon the traveled part of the street, was seriously injured by a runaway team coming from the South and behind him, he was not necessarily guilty of such contributory negligence as to debar him from recovering damages, because he did not, in coming upon the traveled part of the road, by the use of his eyesight and hearing discover, as he possibly could have done, the team in time to avoid being run over. A person traveling upon a public street is not bound to anticipate that the driver of a team will neglect his duties, and it was not the duty of the party injured upon approaching the traveled part of the street to stop and look up and down the street to see if any teams were running away.

6. The failure of a person driving along upon the public street of a city, run over from behind by a runaway team harnessed to a baggage wagon, to look behind him to discover the approaching team and wagon, will not, as a matter of law, render him chargeable with such contributory negligence as would prevent a recovery for injuries thus received.

7. In an action for personal damages, the answer set forth a compromise and settlement between the parties of all supposed liability on the part of the defendants. To this answer plaintiff filed a general denial only. There was no written contract or agreement signed by the parties. *Held*, it was competent on the part of the plaintiff upon the trial to introduce any facts under the general issue showing he never made any compromise or settlement, and for this purpose it was competent for him to produce evidence that at the time of the alleged settlement with him he was delirious and wholly unconscious.

Error from Atchison County.

*Messrs. Everest & Waggoner* and *Smith & Solomon*, for plaintiff in error; *Messrs. Webb & Martin*, for defendant in error.

HORTON, C. J., delivered the opinion of the court:

On and prior to August 19, 1880, it was part of the business of Moulton & Yates, defendants below, to transport baggage in the City of Atchison, and deliver the same at the depots and residences in the city, for which purpose they kept horses and wagons, and also employed drivers. On the said 19th day of August, one Thomas N. Johnston, a driver employed by them, and in charge of two horses and a baggage wagon, to which they were harnessed, was delivering a piece of baggage at a residence on South Fifth Street, in

that city, when the horses ran away with the baggage wagon, northwardly on the street, and, when near the crossing of Park Street, struck against defendant in error's, plaintiff below, wagon and broke it, and also inflicted severe personal injuries upon him. A few months thereafter, this action was commenced by plaintiff below to recover damages on account of the injuries to his person and property. Among other matters, the petition charged that the driver was the servant of the defendant's below, and that while acting in the line of his employment, he negligently, carelessly and wrongfully left the team without being properly hitched or fastened, and without being attended by any one; that while the team was unhitched and unattended, the driver negligently went away from the horses into a house on the street, and, as there was nothing to prevent, they ran away.

It is contended by the counsel prosecuting this proceeding in error, that the special findings of the jury failed to show any negligence on the part of defendants below, and did show contributory negligence on the part of the injured party. To establish that the defendants were not guilty of negligence which caused the injury complained of, counsel assert that there is no absolute rule of law that requires one who has a horse in a street to tie him or hold him by the reins, and refer to the special findings of the jury that the team had been used three or four years in drawing omnibuses and baggage wagons in the city in close proximity to locomotives and moving trains; was gentle and quiet, and well adapted for the purposes it was being used; was without vicious propensities or restive disposition; had never before been frightened or ran away; or even exhibited any disposition or propensity to become frightened or run away; that the driver had had charge of the team several months, was a careful and prudent person, of sober and steady habits, and competent to discharge the duties devolving upon him by his employment; that there was no hitching post, or tree, or fence, to which the team could have been fastened; that there was no object or thing about the team where it was left to frighten or cause it to run away; that the team was hitched to a large baggage wagon, weighing fourteen hundred to seventeen hundred pounds; that the driver, when delivering the baggage, wound the reins around the brake rod, and did not go from the team a greater distance than twenty-five to thirty feet, and when the team and baggage wagon were so left by him, the rear wheels of the wagon rested in a ditch two and one-half feet deep and three feet wide. Counsel conclude from all this that the injuries were the result of an accident, unforeseen or fortuitous, and one which ordinary prudence could not have guarded against.

We do not hold that the leaving of a team of horses in a street without being tied or held by the reins is, under all circumstances, as a matter of law, negligence *per se*. It is common for persons in a street doing business with horses, to leave them standing in their immediate presence while attending to business, and it is not unlawful for them to do so, unless prohibited from so doing by an ordinance, or the authorities of the city. It is commonly safe to do so, and where the horse is in charge of a careful driver, and is neither vicious nor unmanageable, accidents are rarely occasioned thereby. The driver, however, in such cases, ought to be near his horse, and in a condition to control him by his voice, and to reach him, if necessary, with his hand in an emergency. In this case, however, there were sufficient findings to establish culpable negligence on the part of the driver, and as he was the servant and employee of the defendants below, and acted in the line of his employment at the time, his employers are responsible for the injuries resulting from his negligence. The jury not only found that at the time the team started to run away it was standing in a public street of the city without being securely fastened and without being attended by anyone, but that the driver did not exercise reasonable and ordinary care in fastening the team; that he did not fasten it in the usual manner he had been in the habit of fastening the same, as he generally carried a weight for that purpose, and that it was negligence to leave the team in a public street of the city unhitched and unattended. Again, it appears from the findings that after the driver had driven his wagon in front of the dwelling house where he was to deliver baggage, and had wound the reins around the brake rod, he took from the wagon a trunk, or box, and carried it to the house, which was a distance of some twenty to thirty feet. It was at the time the driver was carrying the baggage to the house that the team started off; they soon got into a trot, and then began to run; at the time the team started off, the driver was not near enough to reach or stop them. He was not able to control the team by his voice, or in any other way, when he started after it. With the baggage in his arms, he was powerless to look after the team, and was unable to overtake it until plaintiff below had been run over. Clearly, there was evidence tending to prove negligence, and it was, at all events, sufficient for the jury to consider. They had the opportunity to do this. An examination of the decisions fully justifies the findings of the jury that defendants below were guilty of negligence. In McCahill v. Kipp (2 E. D. Smith, 413), a horse in charge of the defendant's servant took fright from the act of a boy in carelessly throwing down a wheelbarrow, and ran away, bringing a cart attached to him in contact with a horse belonging to plaintiff. The evidence showed that at the time the horse became frightened no efforts were made to guard against him running away, or by any one having hold of him so as to prevent it. The servant in charge of the horse said, he "seized hold of the horse after he ran, but could not hold him." The court said that the evidence was sufficient to satisfy the jury of the defendant's neg-

ligence, as the defendant was responsible if he, or his servant, was guilty of any negligence which caused the injury. In Illidge v. Goodwin (5 C. & P. 190), it was decided that if a horse and cart be left standing in the street without any person to watch them, and a person jostle against the horse and cause it to back against a shop window, the owner is liable for the damage, for he must take the risk of all the consequences that result from the horse being unattended. In Dickson v. McCoy (39 N. Y. 400), where the plaintiff, a child of ten years, was passing the stable of the defendant upon the sidewalk of a populous street in the City of Troy, when defendant's horse came out of the stable, going loose and unattended, and, in passing, kicked the plaintiff in the face, it appeared that the horse was young and playful, and there was no proof of a malicious or vicious disposition. The court said: "It is not necessary that a horse should be vicious to make the owner responsible for injury done by him through the owner's negligence. The vice of the animal is an essential, if, only when but for it, the conduct of the owner would be free from fault. If the most gentle horse be driven so negligently as to do injury to person or property, the owner or driver will be responsible." Many other cases could be cited of like purport.

We pass now to the consideration of the question of contributory negligence. At the time of the injury complained of, plaintiff below was engaged in hauling dirt and helping to make a fill on Fifth street. He was, therefore, engaged in a lawful work, and had a right to be upon the street with his wagon and horses. According to his evidence, he had unloaded his wagon, driven up on Fifth street, the usual wagon track to pass back and forth on, and while he was on the wagon driving North, he was run over by the runaway team coming from the South, and he did not hear or see the team coming behind him until it was upon him. The driver testified that plaintiff below was driving his wagon along Fifth street, going the same way the team was running; that he looked back towards the team, when it was seventy-five or one hundred yards behind him, and jumped off his wagon on the left or west side in front of the team running away. The jury found as a fact that plaintiff below did not see the team after it started to run away, until the collision. Counsel, however, call special attention to certain findings, and strenuously contend that they establish that plaintiff's injury was the result of his own carelessness. These particular findings are as follows:

"4. Did plaintiff, on said 19th day of August, 1880, in depositing said dirt in the fill, enter the street from Park street, and drive his team below the level of the traveled portion of Fifth street? Ans. Yes.

5. After unloading his wagon and depositing the dirt, did plaintiff then drive his team up on to the traveled portion of said Fifth street? Ans. Yes.

6. In driving up on to Fifth street, did plaintiff's team face South on the street, then gradually turn towards the West, and around so that his team faced on the North on the narrow part or portion of the traveled part of Fifth street? Ans. Yes.

7. When the plaintiff drove out of the fill on to Fifth street, could he have seen several blocks South on Fifth street? Ans. Yes.

8. Did plaintiff then look South on Fifth street? Ans. No.

42. For some three hundred feet South of where plaintiff was injured, was said Fifth street of uneven surface and covered with stone? Ans. Yes

48. After said plaintiff had come up out of the fill, could he, by the proper use of his eyesight and hearing, have discovered the runaway team in time, so that by the exercise of reasonable and ordinary care he could have avoided the injury complained of? Ans. Yes.

The only finding needing special comment is the one numbered 48, and this finding must be read in connection with the other special findings. Read in this connection, the finding may be interpreted to mean that when plaintiff drove his team up on to the traveled portion of Fifth street, he could then, after reaching Fifth street, and while his team was facing South, by the proper use of his eyesight and hearing, have discovered the runaway team in time, so that by the exercise of reasonable and ordinary care he could have avoided it. Other special findings show that the plaintiff, soon after he had reached the traveled part of Fifth street with his team from the part below the level thereof, turned his team around so that it faced north on the traveled part of the street, and had driven North on the street about forty or fifty feet at the time he was run over; that at said time he was engaged in a lawful vocation; that the team which ran over him came from the corner of R and Fifth street (South of and behind him), and that he did not see the team after it started to run away and before the collision. Considering the situation in which plaintiff below was placed at the time he was hurt, it appears to us from a perusal of all the special findings, that the jury did not intend by finding No. 48, to attribute to the plaintiff negligence directly contributing to the injury complained of. In view of the other special findings, said finding can not be interpreted to mean that at the time of being run over he could have avoided the team by the proper use of his eyesight and hearing. This finding seems to have reference only to the time of his coming up out of the fill on to the street, and not to the time he was driving north. With this interpretation, all the findings are in harmony with each other and in harmony with the general verdict. The failure of the plaintiff below, as he was driving upon the public street of the city, to look around him to discover an approaching team or wagon, would not, as a matter of law, render him chargeable

with such contributory negligence as would prevent a recovery for injuries received from the team and wagon running over him. Under such circumstances, a person would not be in a place to anticipate danger, and whether it was possible for plaintiff below to have looked up and down the street and discovered the runaway team before the collision, is not necessarily controlling. He had the right, without being charged with negligence, to act upon the presumption that he would not be disturbed by a runaway team upon the public street. This is not like the case of a person who is wrongfully on the track of a railroad, knowing that a train passing over the track would necessarily pass over him, unless he got out of the way, and who fails to look and listen for a train; nor is this case like that of a person approaching a railroad crossing upon a public highway, where, according to many of the authorities, before going upon such crossing, he is bound to stop and look out for the train, and must not rush heedlessly nor remain unnecessarily on a spot over which the law allows engines to go to and fro. Reeves v. Railroad, 30 Pa. St. 464. See, however, Railroad v. Rice, 10 Kan. 426. The trial judge fully declared the law upon this point in the following language: "The plaintiff was not bound to anticipate that the defendant's servant would neglect his duty, nor that defendant's horses would run away. It devolved upon him, however, to use that care which men usually do in driving a wagon along such a street, and to make use of his eyes and ears for his own protection and safety. If he did this, nothing more can properly be required of him. But if he saw or heard the runaway team overtaking or coming upon him, it was his duty to get out of the way if possible. If, however, it came upon him suddenly and without warning, by unusual noise or otherwise, and if he had no sufficient time to enable him to get out of the way; or if the roadway at the place was so narrow and the speed of the runaway team so great that he could not get out of the way, then no negligence was attributable to the plaintiff to defeat a recovery." Even if the injured party had seen the team coming, and in trying to save his property had stayed upon his wagon a little too long for his own safety, and then, without time for cool deliberation, had jumped off the wagon on the wrong side, we would hesitate to disturb the verdict of the jury, as it is almost impossible to determine in such an emergency, as a matter of law, what a prudent man would do. It would be unjust to hold him negligent because the instinct of self-preservation did not instantaneously suggest the most effectual method of avoiding the team and of escaping impending danger. Schultz v. N. W. R. Co., 44 Wis. 638; Cottrill v. Railway Co., 47 Wis. 634; Ditburner v. Railway Co., 47 Wis. 138.

Counsel assign as error the introduction of evidence tending to show that at the time of the alleged settlement and adjustment pleaded in the answer, the plaintiff below was mentally incapacitated from entering into any agreement. This, upon the ground that the reply did not contain any new matter by way of confession and avoidance. The finding of the jury that there was no settlement agreed upon between the parties, and the further findings that the defendants below did not expend the money paid out by them for the use of the plaintiff below upon any contract, renders such evidence, even if incompetent, not very important. Had the jury found that there was a contract of settlement formally made, but that the plaintiff was mentally incompetent to make it, and it was therefore void, the question sought to be presented by counsel would be squarely before us. The reply denied the settlement as a fact. It is conceded that there was no release or agreement in writing signed by plaintiff below, as in Railroad v. Doyle, 18 Kan. 58. Therefore, evidence of facts showing it impossible for such party to have entered into any agreement, was competent. If plaintiff below was delirious and unconscious at the time of the pretended agreement and never afterwards, while conscious, assented to or ratified any such agreement, then, in fact, there was no settlement or adjustment. The evidence that defendant below was mentally incapacitated from entering into a contract or agreement, was not offered as new matter in the way of confession and avoidance, but offered and admitted under the reply to prove the fact that there was no compromise or settlement between the parties. It is clear to us that where an agreement has not been formally reduced to writing, any facts may be shown under the general issue which destroy the effect of the allegations of the execution of the contract. In such a case, the evidence is offered to disprove the facts alleged and denied, not that the allegations of the pleading are proved, and that there are other existing facts which avoid their effect. In Massachusetts the doctrine is still stronger. See Harris v. Carmody, 15 West. Jur. 564.

Several exceptions were taken to the charge of the court, and also to the refusal of the court to give instructions prayed for by defendants below. We have carefully examined all of the instructions, and do not perceive that the law was not sufficiently declared for the purpose of this case. In a part of the charge the court used the following language:

"But if said servant or driver was not then in the exercise of ordinary diligence, the plaintiff is entitled to recover unless the defendants have established one of their said two defenses, *viz.*: Contributory negligence of the plaintiff, or a compromise, adjustment and settlement between the parties." Taken alone, this part of the charge unexplained, in a case where the evidence of the plaintiff tended to show him greatly guilty of contributory negligence as the approximate cause of the injury, might be misleading. But this language is to be construed with other portions of the charge, and as the court, prior to the giving of these words, directed the jury "that the bur-

den of proof rested upon the plaintiff in the first instance to show that he was injured in person or property, and that the injury resulted from the negligence of the defendants' servant in the use of the horses and baggage wagon, and that it devolved upon him to show these facts by preponderance of evidence," we see no cause of complaint. Of course, if the testimony of a plaintiff establishes that he is guilty of contributory negligence as to debar him from recovering damages, it is not necessary that the defendant should establish over again by his own testimony such negligence. If the contributory negligence is established either by the testimony of the plaintiff or defendant, the defense of such negligence is made out. The court in its charge, we suppose, merely intended to announce the rule laid down by this court that the *onus probandi* as to the negligence of the plaintiff is on the defendant, and if the evidence produced by the plaintiff shows negligence on the part of the defendant, and is silent as to the conduct of the plaintiff, it makes out a case for recovery. R. Co. v. Pointer, 14 Kan. 137. As the jury specially found that plaintiff below did not see the team after it started to run away before the collision, and as negligence is not imputable to a person for failing to look out for danger, when, under the surrounding circumstances, he has no reason to suspect any, defendant below could not have been prejudiced by the instruction as to the *onus probandi*, of contributory negligence.

The newly discovered evidence presented upon the application for a new trial is called to our attention, and the claim is made that the court erred in refusing to grant a new trial thereon. Such evidence, at most, was merely cumulative, and its introduction would not have necessarily changed the verdict. After a careful examination of the whole record, and a consideration of every point presented, we are of the opinion that no substantial error appears. Judgments ought not to be reversed, except for errors which go to the merits, or in some way prejudice the rights of a party. Trifling matters that do not tend to mislead a jury, or affect any party's right are not grounds for reversal.

The judgment of the court will, therefore, be affirmed. All the justices concurring.

## WEEKLY DIGEST OF RECENT CASES.



1. ACTION—ASSIGNABILITY—CLAIM AGAINST RAILROAD FOR KILLING STOCK.
Mere personal torts die with the party and are not assignable. Such are actions of slander, libel, assault and battery, false imprisonment, *crim. con.*, seductions, etc. On the other hand, when the injuries affect the estate, rather than the person, when the action is brought for damages to the estate, and not for injuries to the person, personal feelings, or character, a right of action could be bought or sold. Such right of action, upon the death, bankruptcy or insolvency of the party injured, passes to the executor or assignee as part of his assets, because it affects his estate and not his personal rights. *G——, etc. R. Co. v. Freeman*, S. C. Tex., Austin Term, 1882, 1 Tex. L. Rep. 233.

2. ARMY AND NAVY—LONGEVITY PAY—SERVICE AS CADET.
1. It seems that the period of service as a cadet at West Point can not be taken into account in computing the longevity pay for an officer of the United States army under the act of 1878. 2. But a *pro forma* judgment in favor of the claimant rendered in such a case, for such a period, by consent of the Attorney-General, because otherwise no appeal would lie, and in order to make it a test case, was a waiver of the error of allowing pay for such period. *United States v. Babbitt*, U. S. S. C., March 6, 1882, 3 Morr. Trans., 757.

3. CHARITABLE CORPORATIONS — CHANGE IN CORPORATE POWERS—EFFECT.
1. A change in the charter of a charitable institution of a State which vests the visitorial power not only in the presidents of corporations organized by other States for the purpose of collecting subscriptions to such charitable institutions (in whom alone the visitorial power at its first organization had been vested), but also in the governors of all States which contributed to the support of the institution and the superintendents of certain State institutions of a similar character, is, as to such corporations, so fundamental a change in the institution that they can not be forced to pay to such institution subscriptions collected for it before such change. 2. Charitable subscriptions to corporations so organized are in the nature of contracts, the conditions of which legislatures can not modify, however much they may modify the organization of a charity in point of form; corporations receiving such subscriptions are trustees as well for the contributors as for the charitable institution for which they are collecting such subscriptions, and when those subscriptions are made on certain conditions, as for the benefit of a charity organized in a certain way, such corporation trustees can not be compelled to pay such subscription to such charity after a fundamental change in its organization, at least without the consent of the subscribers. 3. The general power of chancery courts over public charities is not applicable to the case of such subscriptions, they being in the nature of contracts. *American Printing House for the Blind v. Louisiana Board of Trustees*, U. S. S. C., March 6, 1882, 3 Morr. Trans., 763.

4. CONTRACT — ACCORD AND SATISFACTION — ACCEPANCE OF LESS THAN DEMAND.
An agreement between the maker and holder of a note not due, that the former will pay and the latter receive a less sum than the unpaid amount called for by the note in full satisfaction of the same, is valid. If the maker duly offer to perform on his part, and the payee refuses to perform on his part, an action lies by the former for the damages resulting to him from the breach of the contract by the latter. *Schweider v. Lang*, S. C. Minn., 14 Ch. Leg. N., 371.

5. CORPORATION—STOCKHOLDERS' LIABILITY — INSURANCE COMPANY.

Where the charter of an insurance corporation provided that stockholders should be personally liable for the debts of the corporation in case its losses exceed its assets, a suit at law by a policy holder against a stockholder to enforce such liability is not maintainable unless it is averred or made to appear that the losses of the corporation exceed its assets. *Blair v. Gray*, U. S. S. C., March 6, 1882, 3 Morr. Trans., 761.

6. EQUITY—RIGHT OF JUNIOR INCUMBRANCER TO REDEEM.

A decree in a chancery suit allowing a junior incumbrancer to redeem real estate which had been sold at a trust sale on condition that he would pay off an incumbrance prior to his own, and also refund to such incumbrancer the amount of an incumbrance prior to both, and the taxes and insurance on the property, which had been paid by such incumbrancer, gave him all the rights to which he was entitled, and was correct. *McCormick v. Knox*, U. S. S. C., March 6, 1882, 4 Morr. Trans., 107.

7. EXEMPTION—"HOUSEHOLD AND KITCHEN FURNITURE"—HOTEL FURNITURE.

Art. 6834, Pasch. Dig., construed as exempting from forced sale the household and kitchen furniture of a family, used by them as a family, but not as protecting the furniture of a hotel which is used for the accommodation of guests and boarders. Such furniture is not exempt by reason of the fact that the hotel-keeper is the head of the family. *Bond v. Ellison*, S. C. Tex., Austin Term, 1882, 1 Tex. L. Rep., 236.

8. FEDERAL JURISDICTION—"FEDERAL QUESTION"—ADVERSE POSSESSION.

The question whether the title of the true owner of lands is extinguished by adverse possession for a certain length of time is not a Federal question. *Poppe v. Langford*, U. S. S. C., March 6, 1882, 3 Morr. Trans., 762.

9. INSURANCE, LIFE—INSURABLE INTEREST—WAGER POLICY.

1. An insurable interest in the life of another is such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from ties of blood or marriage, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. 2. An insurance policy on the life of another by one not having such an interest, is a wager policy and void. 3. An assignment of a policy to a party not having an insurable interest, whether of the whole or a portion merely of the insurance money, is valid only to the extent of loans or advances made on account of it, or the premiums paid on its security; but as far as it attempts to assign any surplus, is as void as a direct insurance would be, and is equally objectionable as a wager policy. 4. If, under color of such assignment, the assignee collects the money due on such a policy, the assignor or his representatives may recover the amount so collected, less any loans or advances, and the rule of *par delictum* does not apply to such a case. *Warnock v. Davis*, U. S. S. C., March 6, 1882, 4 Morr. Trans., 93.

10. MAIL TRANSPORTATION—WAIVER—COMPENSATION.

1. The sixth section of the act of Congress of 1862, incorporating the Pacific Railroad Company, constituted a contract between it and the government, and prescribed a rate or mode of computation which was *sui generis*, and was not affected by sections 3997-4005 of the United States Revised Statutes. 2. Inasmuch as the company was by its contract bound to perform the service of carrying the mail for the government, its performance of such service under protest was not a waiver of any rights under its contract. 3. The rate of compensation under such contract is a question of fact, subject to the proviso that it must be fair and reasonable, not to exceed the amounts paid by private parties for similar services. It may include an allowance for the transportation of mail agents and clerks. *Union Pac. R. Co. v. United States*, U. S. S. C., March 6, 1882, 3 Morr. Trans., 728.

11. MUNICIPAL BONDS—ISSUED BY DE FACTO COUNTY COURT—INNOCENT HOLDER FOR VALUE—ISSUED WITHOUT VOTE.

1. County bonds issued in Missouri by a *de facto* county court, sealed with the seal of the court and signed by the *de facto* president, can not be impeached in the hands of an innocent holder, by showing that the acting president was not *de jure* one of the justices of the court. 2. It can not be set up as a defense to bonds issued by counties in Missouri in payment of subscriptions to the capital stock of a company, and in the hands of innocent holders, that the company to whose stock the subscription was made was not organized within the time limited by its charter. 3. Bonds issued by counties in Missouri in 1870 and 1871 in payment of subscriptions to railroad stock, without a vote of the people, are valid if the subscription was made under authority of charters granted in 1857, which did not require such vote, the State Constitution of 1865 having been construed at the time of the issue of such bonds not to be retroactive. 4. County bonds and coupons issued in 1870 and 1871 in payment of subscriptions to railroad companies, were not required to be stamped by the United States internal revenue laws in force at the time of their issue, being exempt from taxation as official instruments issued by the officers of any State, county, town or other municipal corporation. 5. The execution of the bonds not being denied under oath, it was not necessary, according to Missouri practice, to prove the order of the county court authorizing their execution. 6. *Bona fide* ownership of the coupons sued on being denied, it was not only proper but necessary to prove it. *Ralls County v. Douglass*, U. S. S. C., March 6, 1882, 4 Morr. Trans., 102.

12. PUBLIC LANDS—GRANTS TO COMPANIES CARRYING MAIL.

The deductions under the thirteenth section of the act of Congress of July 12, 1876, and under the act of June 17, 1877, of the compensation to be paid for carrying the mails, can not be made against a company whose railroad has been the subject of a land grant, when the service had been rendered during the term of a written contract for four years made by the Postmaster General, and which had not terminated when the acts making the reduction took effect. *Chicago, etc. R. Co. v. United States*, U. S. S. C., March 6, 1882, 3 Morr. Trans., 720.

13. REVENUE—IMPORT DUTIES—SUGAR GRADES—COLOR TEST.

1. Under schedule G, section 2504, of the United States Revised Statutes, Congress intended to prescribe the color test alone, graded by the Dutch standard, as the mode of classifying grades of sugar for duties, even in cases where substances had been introduced into the sugar during the

process of manufacture for the purpose of making it darker, and so reducing the duties; and the treasury department had no right to make regulations grading the sugars for duty according to their actual saccharine strength as ascertained by the polariscope or other chemical tests. 2. Nor do sections 2914 and 2915 of the Revised Statutes of the United States confer such a power on the treasury department, the former only directing it to furnish to the collectors the standard prescribed by Congress and not to make a new standard; and the latter merely being intended to prevent fraud in making up the packages. *Merritt v. Welch*, U. S. S. C., March 6, 1882, 3 Morr. Trans., 735.

14. STATUTE OF LIMITATIONS — SUFFICIENCY OF NEW PROMISE.

In a suit on a promissory note, in order to remove the bar of the statute of limitations, it is not necessary that there be an express promise to pay, but it is sufficient if a clear, distinct and unequivocal acknowledgment of the existence of the debt, be made to the creditor or his known agent by the debtor, or some one authorized to act for him. *Wesner v. Stein*, S. C. Pa., May 2, 1882, 14 Lanc. Bar, 29.

15. TAXATION—SUCCESSION TAX—REPEAL.

Where a testator left a legacy to his wife for life, and on her death to trustees for certain purposes, and the widow died in 1872, no succession tax can be levied under the act of Congress of June 30, 1864, and the amendments thereto, which acts were repealed by the act of July 14, 1870; inasmuch as no tax under the terms of the act could be levied on the legacy while in possession of the wife, nor until the possession had actually vested in the remainder-man, which did not happen till the death of the widow, and before that time the repealing act had gone into operation. *Mason v. Sargent*, U. S. S. C., March 6, 1882, 3 Morr. Trans., 752.

16. TRUSTS—PERSONAL LIABILITY OF TRUSTEE.

Generally one covenanting as trustee is personally liable on the covenant. But one, covenanting as trustee, may limit his liability by adding "and not otherwise," or "to the extent of the trust funds." A trustee, having, under an order of court, mortgaged trust property and covenanted in the mortgage as trustee to pay the mortgage debt, is sued personally on the covenant. *Held*, that the trustee is not personally liable, because the court can see that it was not the understanding of the parties that he should be so. *Glenn v. Alison*, Md. Ct. App., Md. L. Rec., July 29, 1882.

17. WAIVER—PERFORMANCE UNDER PROTEST.

The performance by the railroad company of the service imposed upon it by its mail contract, protesting against the reduction of compensation, is not a waiver of any rights under the the contract. *Chicago, etc. R. Co. v. United States*, U. S. S. C., March 6, 1882, 3 Morr. Trans., 720.

18. UNITED STATES—CLAIM—ALLOWANCE EQUIVALENT TO ACCOUNT STATED.

An allowance of a claim by the Commissioner of the Internal Revenue under section 3220 of the Revised Statutes of the United States for taxes, etc., illegally assessed, is equivalent to an account stated between private parties, and is binding on the United States until impeached for fraud or mistake, and is *prima facie* evidence of the amount due, and if not paid on application to the Treasury Department, the court of claims has jurisdiction of an action based thereon; because such an allowance raises an implied promise on the part of the United States to pay any amount actually due the claimant, and the claim for the payment of such allowance is founded on an act of Congress within the meaning of the law defining the jurisdiction of that court. The lodging of the appeal made out in due form with the proper collector of internal revenue for the purpose of transmission to the commissioner in the usual course of business, under the requirements of the regulations of the Secretary, was in legal effect a presentation of the appeal to the commissioner under the provisions of section 3228 of the Revised Statutes of the United States. *United States v. Real Estate Savings Bank*, U. S. S. C., March 6, 1882, 4 Morr. Trans., 45.

## NOTES.

——The Cause List at Guildhall contains 165 cases—a number unprecedented in smallness for many years. In 1880 there were 412 causes for the corresponding sittings. * * * * In spite of the falling off in business, there is no lack of aspiring practitioners. Eighty-seven barristers were called on Wednesday, as against eighty-four for this time last year The laborers would seem to be greater than the harvest.—*Law Journal.*

——Judge Bleckly, of Georgia, having resigned, read the following verses on the conclusion of his last opinion. The verses may be found in 64 Ga. 452:

IN THE MATTER OF REST.

I.

Rest for my hand and brow and breast,
For fingers, heart and brain!
Rest and peace! a long release
From labor and from pain:
Pain of doubt, fatigue, despair—
Pain of darkness everywhere,
And seeking light in vain!

II.

Peace and rest! Are they the best
For mortals here below?
Is soft repose from work and woes
A bliss for men to know?
Bliss oftime is bliss of toil:
No bliss but this, from sun and soil
Does God permit to grow.

——In writing opinions and other documents, Mr. Justice Clifford, of the United States Supreme Court, always avoided as much as possible the definite article. He would write page after page without a single "the." Why he did so no one ever found out, nor, indeed, dared to find out, except the jocular Justice Grier, who alone could take liberties with his dignified colleague from Maine. Once, in hope of solving the mystery, he asked, slapping Clifford on the back as he spoke: "Cliffy, old boy, what makes you hate the definite article so?" But Clifford drew himself up with Roman dignity and replied, gravely: "Brother Grier, you may criticise my law, but my style is my own."